

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 1st day of August, two thousand and six.

PRESENT:

HON. DENNIS JACOBS,
HON. ROBERT D. SACK,
HON. BARRINGTON D. PARKER,
Circuit Judges.

Itiakorit John Osele,
Petitioner,

-v.-

No. 05-2899-ag
NAC

United States Attorney General,
Respondent.

FOR PETITIONER: Itiakorit John Osele, pro se, Buffalo, New York.

FOR RESPONDENT: Terrance P. Flynn, United States Attorney for the Western District of New York, Mary K. Roach, Assistant United States Attorney, Buffalo, New York.

UPON DUE CONSIDERATION of this petition for review of the Board of Immigration Appeals (“BIA”) decision, it is hereby ORDERED, ADJUDGED, AND DECREED that the petition for review and motion to expedite release from detention are DENIED.

1 Itiakorit John Osele, pro se, petitions for review of the BIA’s denial of his motion to
2 reopen his removal proceedings. We assume the parties’ familiarity with the underlying facts
3 and procedural history. We review only Osele’s challenge to the BIA’s January 25, 2005 denial
4 of his first two motions to reopen because he did not petition for review from the dismissal of his
5 appeal or from any of his subsequent motions.

6 We review the BIA’s denial of a motion to reopen for abuse of discretion. *See Kaur v.*
7 *BIA*, 413 F.3d 232, 233 (2d Cir. 2005) (per curiam); *Jin Ming Liu v. Gonzales*, 439 F.3d 109, 111
8 (2d Cir. 2006). An abuse of discretion may be found where the BIA’s decision “provides no
9 rational explanation, inexplicably departs from established policies, is devoid of any reasoning,
10 or contains only summary or conclusory statements; that is to say, where the Board has acted in
11 an arbitrary or capricious manner.” *Kaur*, 413 F.3d at 233-34; *Ke Zhen Zhao v. U.S. Dep’t of*
12 *Justice*, 265 F.3d 83, 93 (2d Cir. 2001) (internal citations omitted).

13 An asylum applicant is limited to only one motion to reopen, which must be filed within
14 90 days of a final administrative decision. 8 C.F.R. § 1003.2(c)(2). Here, the BIA did not abuse
15 its discretion in denying Osele’s motions as untimely filed where his appeal was dismissed in
16 January 2004, and he did not file the motions until more than nine months later. Osele is also not
17 entitled to equitable tolling of the filing deadline based on an ineffective assistance of counsel
18 claim where he did not substantially adhere to the requirements in *Matter of Lozada*, 19 I. & N.
19 Dec. 637 (BIA 1988). *See Esposito v. INS*, 987 F.2d 108, 110-11 (2d Cir. 1993) (adopting the
20 requirements created in *Matter of Lozada*).

21 In addition, the BIA did not abuse its discretion in denying Osele’s motion, where he
22 provided no evidence to prove that he failed to receive the BIA’s dismissal of his appeal.
23 “Service by mail . . . shall be sufficient if there is proof of attempted delivery to the last address
24 provided by the alien.” 8 U.S.C. § 1229(c). “A properly addressed piece of mail placed in the

1 care of the Postal Service is presumed to have been delivered.” *Hoffenberg v. CIR*, 905 F.2d
2 665, 666 (2d Cir. 1990). Simple denial of receipt, without supporting evidence, is insufficient to
3 rebut the presumption. *Akey v. Clinton County*, 375 F.3d 231, 235 (2d Cir. 2004). Here, the BIA
4 sent Osele its decision to dismiss his case at the address he had provided when he filed his notice
5 of appeal. Unlike his previous documents, the BIA’s dismissal was not returned by the post
6 office as undeliverable. It therefore is presumed to have arrived.

7 Accordingly, the petition for review and the motion to expedite release from detention are
8 DENIED. Having completed our review, any stay of removal that the Court previously granted
9 in this petition is VACATED, and any pending motion for a stay of removal in this petition is
10 DENIED. Any pending request for oral arguments in his case is DENIED in accordance with
11 Federal Rule of Appellate Procedure 34(a)(2), Second Circuit Local Rule 34(d)(1).

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16 FOR THE COURT:
17 Roseann B. MacKechnie, Clerk
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19 By: _____
20 Oliva M. George, Deputy Clerk